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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

McGREGOR SEA & AIR SERVICES (AMERICA) INC., A Delaware Corporation, Plaintiff, vs. CINEMATRONICS, INCORPORATED, A California Corporation, Defendant.	CASE NO. 491479 POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION TO SET ASIDE RIGHT TO ATTACH ORDER, QUASH WRIT OF ATTACHMENT, AND RELEASE ATTACHED PROPERTY

I

PRELIMINARY STATEMENT

This Court has apparently been seriously misled into the issuance of an ex parte writ of attachment, without notice to the defendant, where the result may be to destroy the goodwill and operations of an extremely valuable business. Plaintiff, a supplier, is clearly aware that it has no current claim against defendant having entered into a novation for valuable consideration, yet has apparently failed to advise the Court of this fact. Furthermore, even if one assumed arguendo that plaintiff had a valid, current and existing claim, plaintiff has sought to attach all the property of

an extremely valuable business, rather than limiting its attachment to those properties which would perfectly secure its claim. The result is a serious abuse of the attachment procedure which should be corrected by this Court immediately before irreparable harm is done to the defendant's business.

II

THE WRIT SHOULD BE QUASHED BECAUSE PLAINTIFF'S CLAIM IS UNMERITORIOUS.

In this case there has been a written novation of the contract, which is the subject of plaintiff's suit. The novation is clearly set out in the attachments to the declaration of Mr. Pierce attached hereto. Novations extinguish the original obligation and substitute a new obligation, in this case an obligation to make another payment after six months. See, e.g., Civil Code 1530, 1532, Beckwith v. Sheldon, 165 C. 319 (1913). A novation need not be written even if the original contract was in writing. Producers Fruit Co. v. Goddard, C.A. 737 (1925). However, in this case, the novation clearly is in writing. Furthermore, whereas consideration is required for a novation, the consideration may simply be the release of the old obligation. Manfre v. Sharp, 210 C. 479 (1930). As proven in the declaration of Mr. Pierce the novation here is supported by the consideration of an immediately payment of $10,000.00, receipt of which has been acknowledged by the plaintiff.

Under the circumstances, plaintiff clearly has no current claim for the balance on its account with defendant. Its claim is premature, and the application for writ of attachment should be denied.

III

ASSUMING ARGUENDO THE VALIDITY OF PLAINTIFF'S CLAIM, ITS ATTACHMENT IS EXCESSIVE.

In this case, plaintiff has purported to attach all the assets of a substantial business rather than limiting its attachment to the amount of its claim. Thus, even if the Court were to find that plaintiff's claim is right, which we vigorously deny, the attachment is greatly excessive to the prejudice of defendant. The attachment should be limited to an amount which will secure plaintiff's claim and not be extended to an amount which will damage the ongoing business of the defendant.

IV

CONCLUSION

For the reasons set forth above, the order granting writ of attachment in this case should be set aside, the writ quashed, and the attachment levy released.

DATED: September 8, 1982.

GRAY, CARY, AMES & FRYE

BY: _____
JAY D. HANSON
ATTORNEYS FOR DEFENDANT